

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE MINNESOTA DEPARTMENT OF LABOR AND INDUSTRY
CODE ENFORCEMENT

In the Matter of the Proposed
Amendment of Rules of the
Minnesota Department of Labor
and Industry, Code Enforcement,
JUDGE
Governing Power Piping Systems

REPORT OF THE
ADMINISTRATIVE LAW

The above-entitled matter came on for hearing before Administrative Law Judge Peter C. Erickson at 9:00 a.m. on Wednesday, December 5, 1990 in Room 5 of the State Office Building, St. Paul, Minnesota. This Report is part of a rule hearing proceeding held pursuant to Minn. Stat. 14.131 - 14.20 to determine whether the Agency has fulfilled all relevant substantive and procedural requirements of law, whether the proposed rules are needed and reasonable, and whether or not the rules, if modified, are substantially different from those originally proposed.

Gilbert S. Buffington, Special Assistant Attorney General, Suite 200, 520 Lafayette Road, St. Paul, Minnesota 55155, appeared on behalf of the Minnesota Department of Labor and Industry. Mary Miller, Staff Attorney, and B. James Berg, Director of Code Enforcement, also appeared on behalf of the Department. The hearing continued until all interested groups and persons had had an opportunity to testify concerning the adoption of the proposed rules.

The Commissioner of Labor and Industry must wait at least five working days before taking any final action on the rules; during that period, this Report must be made available to all interested persons upon request.

Pursuant to the provisions of Minn. Stat. 14.15, subd. 3 and 4, this Report has been submitted to the Chief Administrative Law Judge for his approval. If the Chief Administrative Law Judge approves the adverse findings of this Report, he will advise the Commissioner of actions which will correct the defects and the Commissioner may not adopt the rule until the Chief Administrative Law Judge determines that the defects have been corrected. However, in those instances where the Chief Administrative Law Judge identifies defects which relate to the issues of need or reasonableness, the Commissioner may either adopt the Chief Administrative Law Judge's suggested actions to cure the defects or, in the alternative, if the Commissioner does not elect to adopt the suggested actions, he must submit the proposed rule to the Legislative Commission to Review Administrative Rules for the Commission's advice and

comment,

If the Commissioner elects to adopt the suggested actions of the Chief Administrative Law Judge and makes no other changes and the Chief Administrative Law Judge determines that the defects have been corrected, then the Commissioner may proceed to adopt the rule and submit it to the Revisor of

Statutes for a review of the form. If the Commissioner makes changes in the rule other than those suggested by the Administrative Law Judge and the Chief Administrative Law Judge, then he shall submit the rule, with the complete record, to the Chief Administrative Law Judge for a review of the changes before adopting it and submitting it to the Revisor of Statutes.

When the Commissioner files the rule with the Secretary of State, he shall give notice on the day of filing to all persons who requested that they be informed of the filing.

Based upon all the testimony, exhibits and written comments, the Administrative Law Judge makes the following:

FINDINGS OF FACT

Procedural Requirements

1. On October 24, 1990, the Department filed the following documents with the Chief Administrative Law Judge:

- (a) A copy of the proposed rules certified by the Revisor of Statutes.
- (b) The Order for Hearing.
- (c) The Notice of Hearing proposed to be issued.
- (d) A Statement of the number of persons expected to attend the hearing and estimated length of the Agency's presentation.
- (e) The Statement of Need and Reasonableness.
- (f) A Statement of Additional Notice.

2. On November 5, 1990, a Notice of Hearing and a copy of the proposed rules were published at 15 State Register pp. 1053 - 1055.

3. On November 2, 1990, the Department mailed the Notice of Hearing to all persons and associations who had registered their names with the Department for the purpose of receiving such notice.

4. On November 6, 1990, the Department filed the following documents with the Administrative Law Judge:

- (a) The Notice of Hearing as mailed.
- (b) The Agency's certification that its mailing list was accurate and complete.
- (c) The Affidavit of Mailing the Notice to all persons on the Agency's list.
- (d) An Affidavit of Additional Notice.
- (e) The names of Department personnel who will represent the Agency at the hearing together with the names of any other witnesses solicited by the Agency to appear on its behalf.
- (f) A copy of the State Register containing the proposed rules.

The documents were available for inspection at the Office of

Administrative Hearings from the date of filing to the date of the hearing.

5. The period for submission of written comment and statements remained open through December 17, 1990. The record closed on December 20, 1990, the third business day following the close of the comment period.

6. On November 2, 1990, the Department mailed a copy of the Statement of Need and Reasonableness, proposed rules and Notice and Order for Hearing to the Chairmen of the House Appropriations Committee and Senate Finance Committee. On August 1, 1990, the Department received approval from the Minnesota Department of Finance concerning the proposed increase in fees. This written approval was attached to the Statement of Need and Reasonableness submitted to the Office of Administrative Hearings.

7. Pursuant to Minn. Stat. 14.115, subd. 2, the Department stated its assessment of the impact of these proposed rules on small business in the Statement of Need and Reasonableness. The Department contends that most of the small businesses with high pressure piping insulations would see an increase of less than \$100 per project; that the average increase in fees for over 60% of the projects would be less than \$60; that the average increase in fees for over 80% of the projects would be less than \$100; and that the proposed amendments do not create any additional reporting or compliance requirements for small businesses. The Department states that these proposed increased fees will be included in the price that the affected business quotes to its customers because all contractors will pay the same permit and inspection fees. The Judge finds that the Department has fulfilled the requirements of Minn. Stat. 14.115.

8. Statutory authority to promulgate the proposed rule amendments is contained in Minn. Stat. 326.47, subd. 6 which specifically authorizes the Commissioner of Labor and Industry to set application fees for permits to construct or install high pressure piping systems. Additionally, during the 1989 legislative session, Minn. Stat. 326.461, subd. 2 was amended to include ammonia piping in the definition of high pressure piping.

Nature of the Proposed Rule Amendments

9. The proposed rule amendments clarify the application of the permit fees by adding ammonia refrigeration and piping systems to the rule. The amendments increase the application part of the permit fee from \$25.00 to \$50.00 and the inspection part of the permit fee is increased from one to two percent of the project labor and materials costs. The Department states that without this fee increase, predicted revenues from high pressure piping fees for the next fiscal year will amount to approximately \$235,000. Expenditures

for the next fiscal year are predicted to be approximately \$435,000. With the proposed increase, the predicted revenues will be approximately \$470,000.

Discussion of the Proposed Roles

10. Three primary issues were raised by way of public testimony and/or written comments. The first is that the proposed increase in fees will be detrimental to Minnesota businesses who must pay the fees. The second is that because there are presently no adopted standards for the installation of ammonia piping systems, fees should not be paid for inspections when there is no code to enforce. Thirdly, the Department failed to meet its burden because there was no specific budgetary information presented at the hearing to show a basis for the fee increase pursuant to Minn. Stat. 16A.121, subd. 1a. These issues will be discussed in that respective order below.

11. Several persons testified and submitted written comments on behalf of businesses who would be affected by the proposed fee increase. This testimony and written comment reflected deep concerns about the increasing cost of doing business in the State of Minnesota and that, even if the fee increase will be passed on to "consumers", a more negative business climate will be created.

Currently, Minnesota businesses which install high pressure piping systems do pay permit and inspection fees as mandated by Minnesota statute and rule. Although an increase in the fees will mean more expense for businesses and/or consumers, this really is an ordinary cost of doing business or buying as long as the established fees fall within the parameters of reasonableness and are set in accordance with Minn. Stat. 16A.128. Those issues are further addressed below.

12. Several individuals testified and submitted written comments stating that it was not reasonable to establish a fee for the inspection of ammonia piping systems when there is no code in effect which can be used as a basis for the inspection. The Department stated that although ammonia piping installation rules have not been adopted, the industry has been very cooperative in using interim standards based on American Society of Mechanical Engineers/American National Standards Institute safety codes and standards of the International Institute of Ammonia Refrigeration. Because the statute now mandates the inspection of ammonia pipe installation, the Department stated it will endeavor to inspect using the referenced codes, even though unenforceable, to comply with the law until standards can be adopted. The Judge finds that this approach to the new statutory mandate, as articulated by the Department, has been shown to be reasonable until code standards are in place.

13. The major issue that was raised in testimony and in public comment is the assertion that the Department did not provide sufficiently specific cost and revenue figures to allow the public to adequately assess the reasonableness and need for the proposed fee increase. The Department states candidly in both its Statement of Need and Reasonableness and response to written comments dated December 20, 1990 that the standards it must meet are contained in Minn. Stat.

16A.128, subd. 1a. That statutory provision reads as follows:

Subd. 1a. Approval. Fees for accounts for which appropriations are made may not be established or adjusted

without the approval of the commissioner. If the fee or fee adjustment is required by law to be fixed by rule, the commissioner's approval must be in the statement of need and reasonableness. These fees must be reviewed each fiscal year. Unless the commissioner determines that the fee must be lower, fees must be set or fee adjustments must be made so the total fees nearly equal the sum of the appropriation for the accounts plus the agency's general support costs, statewide indirect costs, and attorney general costs attributable to the fee function.

In addition, subdivision 2a of that statutory section provides that fees not fixed by law must be fixed by rule according to chapter 14."

Finding 9 above sets forth the "balance sheet" for the high pressure piping division of code enforcement. That states only that predicted revenues for the next fiscal year will amount to approximately \$235,000 and expenditures

are expected to be approximately \$435,000. The proposed increase will result in revenues of approximately \$470,000. There was nothing, however, submitted concerning any "appropriation" for code enforcement, or the amount of "general support costs, statewide indirect costs, and attorney general costs attributable to the fee function." The Department did submit a fee review sheet that was submitted to the Minnesota Department of Finance. However, that document reflects code enforcement totals for the boiler, pipefitting and elevator division functions. It sheds no light on why fee increases are being proposed for high pressure piping except in the sense that it shows a positive balance if several proposed fee increases do go into effect.

During the hearing on this matter, James Berg, Director of Code Enforcement, testified that "code enforcement is the budget structure that the agency uses, it does not have a detailed breakdown at lower operating levels." He went on to state that, "The fee structure as it is right now is in a negative position, we are bringing in less money than it costs us to operate. This means under the statutory requirement we have to raise fees somewhere." Regarding a question concerning proposed elevator Inspection fees, Mr. Berg stated that, "Those fees will cover part of our deficit, they will not cover all of it." Mr. Berg did state that, "We narrowed it down. There were two areas where we needed to modify fees for the cost of the services being provided. One was in the area of elevator which we are working on separately. The other was in high pressure piping inspection." However, as the record in this matter clearly shows, there is no documentation or substantiation concerning the reasonableness of the fee increases with respect to specific costs of the Department "attributable to the fee function" of inspecting high pressure piping systems. Without such a showing, the Judge has no basis to determine whether or not the proposed fees are in fact reasonable. This finding of reasonableness must be based, in part, on the costs and factors set forth in Minn. Stat. 16A.128, subd. 1a. The Department's summary of total costs and revenues will not suffice. Even if code enforcement is budgeted as a block, an estimated breakdown between the different fee functions would not seem to be an insurmountable task. Specifically, the Judge finds that the Department has not demonstrated the reasonableness of the proposed rules with an affirmative presentation of facts as required by Minn. Stat. 14.50.

It is not the Judge's intent to postpone the adoption of a fee increase indefinitely if the Department can provide the "bookkeeping" information necessary to show that the increase is warranted. Consequently, as soon as an

addendum to the Statement of Need and Reasonableness can be drafted by the Department, a short notice published in the State Register noticing a reconvened hearing at least 30 days subsequently will be sufficient. This notice must state that an amended Statement of Need and Reasonableness is available which more fully documents the cost and revenue information regarding the proposed fee increase. The notice can then cite the previous published notice and rules rather than republish that same information. Additionally, all persons on the mailing list should be sent a copy of the abbreviated notice and the Department must mail notice to all persons who appeared at the hearing and signed the register. The record of this proceeding will be incorporated into the record of the next proceeding so that the Department only needs to address the new information contained in the amended Statement of Need and Reasonableness.

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. That the Department gave proper notice of the hearing in this matter.
2. That the Department has fulfilled the procedural requirements of Minn. Stat. 14.14, subds. 1, 1a and 14.14, subd. 2, and all other procedural requirements of law or rule.
3. That the Department has demonstrated its statutory authority to adopt the proposed rules and has fulfilled all other substantive requirements of law or rule within the meaning of Minn. Stat. 14.05, subd. 1, 14.15, subd. 3 and 14.50 (i)(ii).
4. That the Department has documented the need for and reasonableness of its proposed rules with an affirmative presentation of facts in the record within the meaning of Minn. Stat. 14.14, subd. 2 and 14.50 (iii), except as noted at Finding 13.
5. That due to Conclusion 4, this Report has been submitted to the Chief Administrative Law Judge for his approval pursuant to Minn. Stat. 14.15, subd. 3.
6. That any Findings which might properly be termed Conclusions and any Conclusions which might properly be termed Findings are hereby adopted as such.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

It is hereby recommended that the proposed rules not be adopted.

Dated this 17 day of January, 1991.

PETER C. ERICKSON
Administrative Law Judge

